

Should Mitchell Eavesdrop Without Court Approval?

By Alan Barth

ATTORNEY GENERAL John Mitchell has come forward with a proposition which, for sheer audacity in the assertion of executive power, may well be unsurpassed by anything since the late Oliver Cromwell installed himself as Protector of England in 1653. The general purport of the proposition can be summarized in a slight variant of a currently popular slogan: All power to the President.

The proposition is set forth in a memorandum filed a few days ago by the Department of Justice with the Sixth U. S. Circuit Court of Appeals, asking that court to set aside a ruling by U. S. District Judge Damon J.

different standards simply because the accused espouses views which are inconsistent with our present form of government."

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THE PROPOSITION put forward by the Attorney General, in his own language, is as follows: "The President, acting through the Attorney General, may constitutionally authorize the use of electronic surveillance in cases where he has determined that, in order to preserve the national security, the use of such surveillance is reasonable." And he contends that it makes no difference whether the threat to the national security comes from foreign subversives or from domestic subversives.

The reasoning behind this proposition is the reasoning behind every form of totalitarianism. The first duty of a sovereign is to protect his sovereignty; the first responsibility of any government is its own perpetuation. Therefore the presidency carries with it "inherent" power to do whatever the President thinks he needs to do to protect the government of the United States from overthrow by force and violence. The Constitution which the President has sworn to preserve would, argues the Attorney General, "hardly render him powerless to do so."

Setting aside the question whether an inability to tap telephones without a warrant would actually render the President "powerless"—getting a warrant has never proved very difficult—and setting aside also the

question whether the White Panthers seriously threaten to overthrow the government of the United States by force and violence, the scope and reach of Mr. Mitchell's proposition remains altogether staggering.

The doctrine of inherent power is a doctrine of limitless authority. It is the very antithesis of a government of laws—and especially the antithesis of a government of limited powers specifically delegated to it by the people through a written constitution.

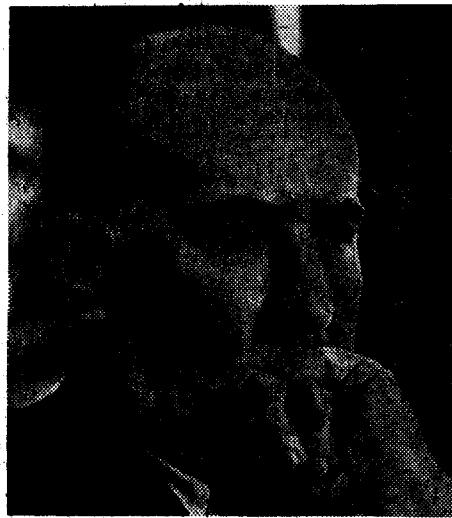
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IN 1967, the Supreme Court ruled that electronic surveillance entails a search of the sort circumscribed by the Fourth Amendment. "Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes," wrote Mr. Justice Stewart, "and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment . . ."

If Mr. Mitchell argues that the inherent powers of the President entitle him to tap a citizen's telephone or bug his bedroom without a warrant, why should he not also argue that these powers entitle him to ransack a man's home and seize his private papers without a warrant whenever he suspects him of subversion?

One cannot help wondering, indeed, if Mr. Mitchell's logic will not carry him one day into contending that the President, acting through his Attorney General, may, when he deems the national security to be in peril, clap a suspect in jail or have him executed without any of the inconvenient formalities of due process.

Could the President, acting through his Attorney General in the name of national



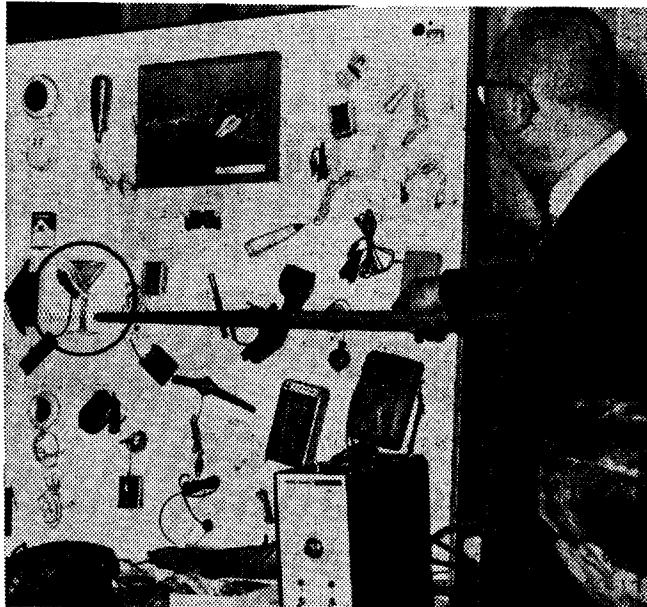
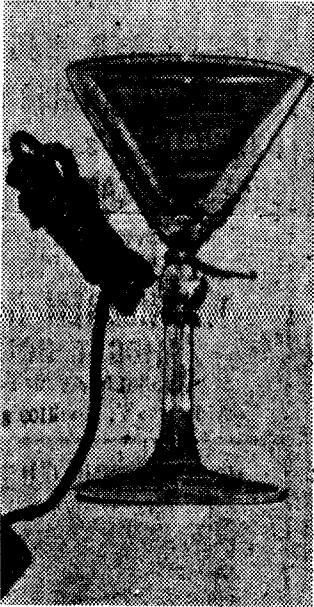
ATTY. GEN. JOHN MITCHELL

Keith in Michigan that the Attorney General has no authority to conduct electronic surveillance in domestic national security cases without prior court approval. The department has asked the Ninth Circuit Court to overturn a similar ruling by another U. S. District Judge in California.

In order to appreciate the peril from which the Attorney General was seeking to save the country by electronic eavesdropping, it is necessary to know a little bit about the facts of the Michigan case. It involved three defendants who call themselves White Panthers and who are accused of bombing the Ann Arbor offices of the CIA in 1968, presumably because they disapprove of U.S. government policies.

Bombing is a very serious crime, of course, and no one suggests that it should not be investigated and prosecuted. Whether or not it threatens the security of the United States, it undoubtedly violates the laws of Michigan. Judge Keith did not even suggest that he had any objection to the use of electronic surveillance in investigating the crime—provided a warrant, or court order, had been obtained in advance—something which the Omnibus Crime Control and Safe Streets Act of 1968 specifically authorizes.

Judge Keith even went so far as to say that the obligation to get a warrant for electronic surveillance could be waived in an investigation of subversive activities carried out by foreign agents, a debatable position. He asserted, however, that the "executive branch of our government cannot be given the power or the opportunity to investigate and prosecute criminal violations under two



A detective explains eavesdropping devices that can be concealed in every day items at a Senate Judiciary Subcommittee hearing.

security, order a telescreen—in the manner of George Orwell's "1984"—placed in every American home, in order to save the country from subversion? It is no answer to this anxiety to say that the Attorney General has no intention of committing such excesses.

In his memorandum to the Court of Appeals, the Attorney General advances another ingenious but essentially disingenuous argument. "The government merely contends," he says, "that when the President, through the Attorney General, determines that the use of electronic surveillance is necessary to gather intelligence information needed to protect the national security, the resulting search and infringement of constitutional rights is not 'unreasonable.'"

But this is a patent begging of the essential question to be decided. The purpose of the Fourth Amendment was to interpose between the citizen and his government the detached and impartial judgment of a judicial officer. The determination of the reasonableness of a search cannot fairly be made by the executive official who wants to prosecute the suspect; it can fairly be made only by a judge. That distinction is a foundation of American jurisprudence.

649

MR. MITCHELL is a conscientious as well as a zealous and patriotic Attorney General. But there is very little in the past record of official electronic surveillance—or at least in what little has been disclosed of that record—to indicate that if left to unchecked ad-

ministrative authority it would be applied discriminately or exclusively against real threats to national security. When one remembers the names of persons reportedly bugged or tapped by the FBI in recent years—the late Dr. Martin Luther King, for example, or Muhammed Ali or Bobby Baker or the gambling czars of Las Vegas to cite but a few—one cannot help concluding that the Justice Department fishes for subversives as one fishes for sardines, with a very large net.

Electronic surveillance may be an effective device for catching subversives. There have been attorneys general who say it is and attorneys general who say it is not. But whatever its virtues, it has vices, too. And Mr. Mitchell seems to have given these vices scant consideration.

649

IN a recent article on the prevalence of FBI wiretapping, Washington Post Staff Writer Ronald Kessler reported: "About a quarter of the senators, congressmen, lawyers, businessmen and journalists responding to a Washington Post questionnaire said they have suspected or believed that their telephones were tapped or their offices bugged."

Such fears may be, as Mr. Mitchell termed them, symptomatic of paranoia. But they are also symptomatic of an anxiety altogether out of place in a free society.

There is a terrible and exorbitant cost in such anxiety. Law-abiding men and women are kept from communicating with each other freely. The very essence, the core, of what makes Americans believe that life in this country is better than life in the Soviet Union is not so much the prevalence of affluence as the absence of constraint. To feel secure against officious intrusion, against the fear of that ominous rap upon the door at

night which is the symbol of the police state, is to enjoy the reality of what is meant by "the blessings of liberty."

It was, according to the authors of the American Declaration of Independence, precisely for the purpose of securing to individuals certain "unalienable rights" that "governments are instituted among men." What a travesty it would be if, in the name of protecting national security, Americans were to forfeit the individual security for the protection of which their government was established! Perhaps the Attorney General has his priorities reversed.

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